RECORD
AND
BRIEFS

FILED
JUN 16 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300, 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION

v.

JACOB LEWIS

ERNST & YOUNG LLP, ET AL.

v.

STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD

v.

MURPHY OIL USA, INC., ET AL.

On Writ Of Certiorari
To The United States Courts Of Appeals
For The Fifth, Seventh, And Ninth Circuits

BRIEF OF *AMICUS CURIAE* THE EMPLOYERS GROUP IN SUPPORT OF PETITIONERS IN NOS. 16-285 & 16-300 AND RESPONDENT MURPHY OIL IN NO. 16-307

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STATEMENT OF INTEREST

The Employers Group, a California non-profit organization, is one of the nation's oldest and largest human-resources management organizations for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group also provides live helpline assistance, online resources and tools, and in-company human-resources consulting services and support to its members. As part of its mission, the Employers Group seeks to enhance the stability, predictability, and fairness of the laws and decisions regulating employment relationships. Many members of the Employers Group have adopted arbitration agreements and programs as a method to resolve employment disputes promptly, fairly, and with far less expense and delay than required for court adjudication of such matters. The Employers Group thus has a direct interest in the correct interpretation and application of both the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).[1]

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[1] Counsel of record for all parties have consented in writing to the filing of this brief.

No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief.

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) protects the right of parties to make and enforce agreements to arbitrate on an individual basis instead of a class or collective basis. Accordingly, as this Court has recognized, the FAA requires the enforcement of "class-action waivers" contained in arbitration agreements, and any obstacle to the enforcement of such waivers is "inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

The National Labor Relations Act (NLRA) does not disturb the FAA's protection of individual arbitration rights. Because the NLRA was enacted after the FAA, it must be interpreted in light of the venerable canon against implied repeals, which holds that a later-enacted statute cannot repeal any part of an earlier statute unless Congress has given some clear indication of its intent to effectuate the repeal. The NLRA does not contain any such clear indication. It does not even mention the issue of arbitration or class litigation, much less create a *non-waivable* right to class litigation in derogation of the right to make and enforce individual arbitration agreements under the FAA.

Because Congress did not supply the requisite clear intent, the National Labor Relations Board cannot repeal the FAA's protection of individual arbitration rights by administrative fiat. Administrative agencies, no less than courts, are bound by the canon against implied repeals. Thus, in the absence of clear authorization from Congress, the Board cannot promulgate an administrative interpretation that would repeal any part of the FAA.

ARGUMENT

I. The NLRA Does Not Displace the FAA's Protection of Individual Arbitration Rights

The NLRA was enacted in 1935, and for the next 80 years "no court decision" ever "held that the Section 7 right to engage in 'concerted activities' . . . prohibited class action waivers in arbitration agreements." *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 356 (5th Cir. 2013). To the contrary, the NLRA was enacted against the backdrop of the FAA, which affirmatively *protects* the right of individual arbitration: The FAA gives parties the right to enter and enforce agreements to arbitrate on an individual basis by mutually agreeing to a "class-action waiver." *Concepcion*, 563 U.S. at 340. Accordingly, any refusal to enforce such an individual arbitration agreement is "inconsistent with the FAA." *Id.* at 344.

The year after this Court recognized the protection of individual arbitration rights under the FAA in *Concepcion*, however, the National Labor Relations Board sought to undermine that decision by announcing a novel reinterpretation of the NLRA, which carried sweeping implications for every employer in the country: It proclaimed that, "notwithstanding the [FAA]," agreements to arbitrate on an individual basis (and waiving the right to proceed on a class basis) are now prohibited in any employment contract involving interstate commerce. *In Re D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012). In other words, despite the fact that individual arbitration agreements have long been a common feature of the American employment landscape, have been enforced for decades by this

Court and others, and enjoy pre-existing statutory protection under the FAA, the Board suddenly declared that such agreements have been illegal for eight decades—without anyone ever noticing before.

The Board's attempt to eliminate the FAA's protection of individual arbitration rights must be rejected because it violates the venerable canon against the "implied repeal of statutes," which serves the dual values of "stability and predictability" in the law. *Hammon v. Barry*, 826 F.2d 73, 80 (D.C. Cir. 1987). Under this canon, a federal statute such as the NLRA cannot be construed to displace any part of an "earlier" statute such as the FAA unless it contains a "clearly expressed congressional intention" to effectuate the repeal. *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). This is a "relatively stringent standard," which is "rar[ely]" satisfied. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996).

The NLRA does not provide the type of "clear" indication necessary to repeal the FAA's protection of individual arbitration rights. The NLRA refers generally to "concerted activities" among a wide range of other subjects, but says nothing about arbitration or class litigation. As a result, the NLRA must be read to coexist with the FAA's right to make and enforce individual arbitration agreements, not to displace it.

A. The FAA Protects The Right Of Parties To Make And Enforce Individual Arbitration Agreements

The FAA protects the right of parties to make and enforce agreements to arbitrate on an individual basis by mutually consenting to a "class-action

waiver." *Concepcion*, 563 U.S. at 344. Accordingly, as this Court has recognized, "invalidating private arbitration agreements denying class adjudication, would be an abridgment . . . of [the] substantive right" to make and enforce individual arbitration agreements under the FAA. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (alteration omitted).

This conclusion follows directly from *Concepcion*, which squarely held that refusing to enforce a "class-action waiver" in an arbitration agreement is "inconsistent with the FAA." 563 U.S. at 344. Where the parties have agreed to arbitrate on an individual basis, the imposition of class proceedings "interferes with fundamental attributes of arbitration." *Id.* As *Concepcion* explained, the entire "point" of the FAA is "to allow for efficient, streamlined procedures," which "reduc[e] the cost and increas[e] the speed of dispute resolution." *Id.* at 344–45. Such "streamlined procedures" are possible in individual arbitration, but "imposing *class* procedures" would "sacrifice[] the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 344, 347–48 (emphasis added).

Moreover, the lack of appellate review in arbitration makes it "poorly suited to the high[] stakes of class litigation," where "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.* at 350. Without appellate review of a collective damages award, "the risk of an error" becomes "unacceptable," which effectively precludes arbitration as a viable option: few if any defendants will choose to "bet the company

with no effective means of review." *Id.* at 350–51. As a result, giving defendants the choice of arbitrating only on a *class* basis is really no choice at all, and it effectively precludes arbitration as a meaningful option.

At the same time, *Concepcion* specifically held that the FAA's savings clause, 9 U.S.C. § 2, does not alter this conclusion. Because the FAA's affirmative provisions *presuppose* the availability of individual arbitration, it would be "absolutely inconsistent" to read the savings clause to authorize a *ban* on individual arbitration. *Concepcion*, 563 U.S. at 343. In other words, the savings clause "cannot in reason be construed" to allow the imposition of class proceedings in contravention of a class waiver, because that would violate the basic principle that "the [statute] cannot be held to destroy itself." *Id.* (citation omitted).

Because the FAA protects the right to make and enforce arbitration agreements containing class-action waivers, any rule prohibiting the enforcement of such waivers would conflict directly with the FAA. Indeed, in *Concepcion*, the conflict was sufficiently clear for the FAA to preempt the law of a *sovereign state*, even though such preemption can occur only if there is a "clear and manifest" conflict between state and federal law. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Accordingly, there can be no doubt that interpreting the NLRA to prohibit individual arbitration agreements would equally create a "square and manifest" conflict with the FAA.

By holding to the contrary, the Seventh and Ninth Circuits flatly defied *Concepcion*: The Ninth Circuit

held that the Board's interpretation of the NLRA as prohibiting individual arbitration agreements creates "no inherent conflict [with] the FAA," *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 n.13 (9th Cir. 2016), and the Seventh Circuit likewise found "no conflict." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016). But neither court explained how this "no conflict" theory makes any sense given *Concepcion*'s holding that banning individual arbitration agreements is "inconsistent with the FAA." 563 U.S. at 344. No explanation is possible, other than outright defiance of *Concepcion*.

B. The NLRA Does Not Contain the Requisite Clear Indication to Repeal the FAA's Protection of Individual Arbitration Rights

"Like any statutory directive," the FAA's protection of individual arbitration "may be overridden by a contrary congressional command." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But in order for the FAA's protection of individual arbitration to be repealed, "the intention of the legislature . . . must be clear and manifest." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). As this Court has repeatedly emphasized, this is a "stringent standard" that is "rar[ely]" satisfied. *Matsushita*, 516 U.S. at 381 (1996). There is no mistaking the level of clarity that this Court has required: the conflict must be "clear and manifest," *Watt v. Alaska*, 451 U.S. 259, 267 (1981), "clearly expressed," *Morton*, 417 U.S. at 551, and "irreconcilable," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) ("irreconcilable"); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939)

("clear and manifest"). Under this stringent standard, this Court "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alterations omitted).

Importantly, the canon against implied repeal is sensitive to the order of statutory enactments, as one of its purposes is to avoid displacing "earlier" statutes, thereby lending stability to the law and protecting reliance interests. *Morton*, 417 U.S. at 550. The canon also recognizes that it is even more difficult for "specific" statutory provisions to be "controlled or nullified" by the later enactment of more "general" provisions. *Id.* at 550–51.

In the specific context of the FAA, this Court has consistently applied the rule that subsequent statutes must speak with "clarity" in order to displace the FAA's requirement that arbitration agreements be enforced "according to [their] terms." *CompuCredit Corp. v. Greenwood*,, 565 U.S. 95, 104 (2012). Unless a statute contains a "contrary congressional command" that overrides the FAA, the statute must be read to comport with the FAA. *Italian Colors*, 133 S. Ct. at 2309. Thus, for example, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions." *Id.* at 2311 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Although the statute at issue in *Gilmer* (the ADEA) expressly conferred a right to collective

action, it gave no indication that this was a *non-waivable* right, and thus it was not sufficiently clear to override the FAA's policy that individuals must be left free to enter agreements to arbitrate on an individual basis.

These principles are dispositive here. The NLRA easily can be read to coexist with individual arbitration agreements, and indeed that is the way everyone always *did* read the statute from its enactment in 1935 until the Board decided *D.R. Horton* in 2012.

At the outset, the NLRA does not mention the procedural mechanism of class litigation, and the term "concerted activities" can be read in any number of ways that have nothing to do with class actions. The term most naturally refers to activities directly related to unionization and collective bargaining, which are the NLRA's clear focus. An employee's agreement to arbitrate individually does not remotely "impede" employees' efforts to unionize, "to bargain collectively," or to engage in like activities, which is what the NLRA protects. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944). The Board's contrary reading would dramatically expand the reach of the NLRA to encompass the procedural right of class litigation without any connection to organizing or bargaining activity, contrary to the way the statute has been understood for eight decades.

Moreover, even assuming the NLRA could be reinterpreted to create a novel "right" to class-action proceedings, the statute contains no clear indication that this hypothetical right would be non-waivable. Indeed, even if the right were non-waivable *outside* of

arbitration, the FAA provides that class-action rights are presumptively waivable *in the specific context of arbitration agreements*. Thus, even when federal law *expressly creates* a right for plaintiffs to use a "class mechanism," the Supreme Court has "rejected th[e] proposition" that this right is "nonwaivable . . . in arbitration." *Italian Colors*, 133 S. Ct. at 2310; *see also Gilmer*, 500 U.S. at 32 ("[T]he fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."). The same conclusion has even greater force here, where the NLRA does not even *mention* class-action rights, much less clearly override the FAA's specific rule that such rights can be waived in arbitration agreements. To the contrary, the NLRA indisputably allows individual employees to opt out of class actions, and it would be anomalous to treat arbitration agreements as a disfavored *means* of opting out.

For these reasons, it is highly doubtful that the NLRA even *can* be read to prohibit agreements to arbitrate on an individual basis. But in any event, it certainly does not contain the type of "clear and manifest" indication that would be necessary to overcome the *protection* that such agreements enjoy under the FAA. *Posadas*, 296 U.S. at 503.

It is instructive to compare the NLRA to another recently enacted statute that contains a far clearer indication of congressional intent to cut back on arbitration rights. As part of the Dodd-Frank Act of 2010, Congress specifically authorized the Consumer Protection Financial Bureau (CFPB) to "prohibit or impose conditions or limitations on" certain

"agreements providing for arbitration" involving consumer financial services. 12 U.S.C. § 5518(a), (b). Pursuant to that specific statutory authority, the CFPB has now issued a proposed rule that would prohibit the use of class-action waivers in covered arbitration agreements. *See* NPRM, 81 Fed. Reg. 32,830 (May 24, 2016). This illustrates how Congress can act with far greater clarity to impose new limits on arbitration rights. It contrasts starkly with the NLRA, which says nothing about imposing any "prohibit[ions]" or "limitations" on any arbitration agreement.

C. *Chevron* Deference Does Not Apply To Agency Interpretations That Would Repeal Prior Federal Law

Both the Ninth Circuit and the Seventh Circuit further erred by concluding that the Board is entitled to *Chevron* deference in interpreting the NLRA to prohibit individual arbitration agreements. *See Lewis*, 823 F.3d at 1153; *Morris*, 834 F.3d at 983 n.5 (stating that the Board's interpretation of the NLRA merits deference because it "is a permissible construction" of the statute). The Seventh Circuit held that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it." *Lewis*, 823 F.3d at 1153. Then, in order to "harmonize the FAA and NLRA," the court held that "the FAA's saving clause" must be read to accommodate the Board's view of the NLRA. *Id.* at 1157–59.

This reasoning is exactly backwards because it requires the FAA *statute* to give way to an *agency interpretation*. On multiple occasions, this Court has

made clear that agencies are bound to follow statutes, not the other way around. Consequently, in order to be faithful to this Court's decisions, the Board's interpretation of the NLRA must be *constrained* by the FAA, and cannot be transformed into an authoritative basis to *displace* the FAA.

To determine whether an agency interpretation is entitled to any deference, courts must first "apply[] the normal 'tools of statutory construction'" to determine whether the agency has any latitude to construe the statute. *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). *See also FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003) (recognizing that interpretive rules "circumscribe[]" the realm of "permissible [agency] action" under *Chevron*). Here, the dispositive "tool of statutory construction" is the canon against implied repeals: because the NLRA contains no clear indication that the NLRA was intended to displace the FAA's protection of individual arbitration agreements, the Board is not permitted to achieve that result by administrative fiat.[2]

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[2] Multiple circuits, including the Ninth Circuit itself, have recognized the same basic point: Where "the presumption[] . . . against implied repeals remove[s] any potential ambiguity that an agency might otherwise resolve, *Chevron* deference has no role to play." *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1075 (9th Cir. 2010). No "deference may be accorded to an agency's view" of whether "one statutory scheme supersedes the other." *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir.

Applying the same logic, this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Accordingly, this case provides an opportunity for this Court to reaffirm the crucial importance of the major-questions doctrine in constraining the overreach of the NLRB. As this Court has long recognized, "[d]eference to the Board cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (ellipsis in original); *see generally King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (warning against agency deference on "question[s] of deep economic and political significance"). That principle

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(continued...)

2003) (citation omitted). *See also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1374 (Fed. Cir. 2005) (Dyk, J., dissenting) (A "policy-driven interpretation under *Chevron* cannot override the clear command of a conflicting statute"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Rules of interpretation bind all interpreters, administrative agencies included.").

applies directly here, where the Board has attempted to revolutionize the entire field of workplace relations by suddenly, for the first time in 80 years, reinterpreting the NLRA to prohibit individual arbitration agreements in virtually every employment relationship in the country. Putting aside the inherent implausibility of such a significant prohibition lying dormant in the NLRA for eight decades, such a sweeping policy change cannot and should not be imposed at the unilateral discretion of the executive branch.

II. California Employers Have an Especially Acute Interest In Combating the Growing Trend of Judicial Hostility to Arbitration

California employers have suffered uniquely from the recurring pattern of judicial hostility to arbitration in defiance of the FAA. This hostility is reflected in, among other things, this Court's reversal of several California decisions and statutes refusing to enforce arbitration agreements under the FAA. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *Concepcion*, 563 U.S. at 341; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39, 54, 66 (2006).

This Court's decision in *Concepcion* has been a special target of defiance in California. Most recently in *Imburgia*, this Court admonished a California appellate court that while "[l]ower court judges are

certainly free to note their disagreement with a decision of this Court," they may not "refus[e] to recognize [its] superior authority." 136 S. Ct. at 468. "*Concepcion* is an authoritative interpretation of [the FAA]," and, "[c]onsequently, the judges of [lower courts] must follow it." *Id.* "The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation." *Id.*

Another example of the defiance of *Concepcion* is the recent decision of the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert denied*, 135 S. Ct. 1155 (2015). In that case, the court announced a new, non-waivable right to bring "representative" actions under the California Private Attorney Generals Act (PAGA). This is a clear end-run around *Concepcion* because it authorizes private class counsel to disregard agreements to arbitrate on an individual basis and instead seek mass awards for alleged class-wide violations of the California Labor Code. Even more distressingly, a divided panel of the Ninth Circuit recently *agreed* with *Iskanian*'s anti-arbitration holding, thus joining in the effort to undermine *Concepcion*. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). (A petition for certiorari raising the *Iskanian/Sakkab* issue is now pending before this Court in *Bloomingdale's, Inc., v. Vitolo*, No. 16-1110.)

California employers have for years struggled to enforce valid arbitration agreements in the face of an ingenious array of "devices and formulas" erected by California state judges and legislators intent on ignoring this Court's jurisprudence. *Concepcion*, 563

U.S. at 342. But now, alarmingly, the Ninth Circuit too has begun subverting employers' federal arbitration rights. This is not just a problem for California, but for the entire national economy: Like the employers in these consolidated cases, many California-based employers do business nationwide or in multiple states, and are thus subject to differing outcomes when seeking to enforce their arbitration agreements in different circuits. Other national and international employers also have a significant portion of their workforce in California, and thus have no choice but to contend with the anti-arbitration animus of the California courts. Accordingly, vindicating the FAA's protection of individual arbitration rights here will send a much-needed message to both state and federal judges in California that this Court will continue to enforce the authority of its FAA precedents with a vigilant eye.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments in *Epic* and *Ernst & Young*, and affirm the judgment in *Murphy Oil*.

Respectfully submitted,

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